Supreme Court
FILED

(1) 05 5 JUN 24 2005

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LUNG FONG CHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Emanuel R. Gold*
Edward Vitale
Howard Levine
Law Offices of Emanuel R. Gold
108-18 Queens Blvd.
Forest Hills, New York 11375
(718) 897-7300

Counsel of Record** ***Attorneys for Petitioner

QUESTIONS PRESENTED

The Second Circuit (Pooler, J.) affirmed the convictions, after a jury trial, of Lung Fong Chen, Joseph Liu and Schuman Tu. Mr. Chen is the Petitioner herein. Defendants were charged with conspiracy to misapply bank funds and to make false entries in bank records, in violation of 18 U.S.C. Section 371, misapplication of bank funds, in violation of 18 U.S.C. Section 656, and making false entries in bank records, in violation of 18 U.S.C. Section 1005. These charges stemmed from a 1990 lease that the defendants, as members of the Board of Directors of Great Eastern Bank, approved on behalf of the bank, and which resulted in a one million payment to a corporation of which the defendants were shareholders.

Subsequently, the Government filed a superseding indictment, stemming from allegations that Mr. Chen and Mr. Liu falsely created a supplemental agreement concerning the 1990 lease transaction. This indictment charged only Mr. Chen and Mr. Liu with two additional counts: One count of conspiracy to make false entries in the books and records of a bank, in violation of 18 U.S.C. Section 371; and one count of making false entries in the books and records of a bank, in violation of 18 U.S.C. Section 1005.

Mr. Chen was convicted of the first three charges stemming from the 1990 lease transaction, however Mr. Chen was acquitted of the latter two charges concerning the allegedly fraudulent supplemental agreement.

The indictment alleges that Mr. Chen, Mr. Liu and others, serving on the Board of the Great Eastern Bank ("GEB"), and also as partners of GEB's landlord, Seven Giants Properties, Inc. ("SG"), misused their position with the bank to approve a one million dollar payment to SG for

less than full value and in the two counts in which the defendants were found *not guilty*, it was alleged that they created documents years later, in an attempt to cover up the improper conduct of paying the one million dollars as aforesaid and causing GEB to pay a higher rental value than it should have for the property rented by SG to GEB.

At trial F.B.I. Agent Ng, who interviewed co-defendant Schuman Tu prior to the indictment testified, from memory, regarding portions of Mr. Tu's statements, which indicated criminal intent on the part of Mr. Chen and Mr. Liu. Mr. Tu was available and in Court during the trial, but did not testify. There was vehement objection to this testimony and a "dry run" was conducted before the jury heard this testimony so that the Court could determine what Agent Ng could and could not say in front of the jury. During his actual testimony the directive from the Court was violated and his statements attributed specific criminal intent to Mr. Chen and Mr. Liu. Although some statements were later stricken and some instruction was given by the Trial Court during its charge regarding these statements, the damage was done.

Indeed, after the jury reported it was deadlocked, the only portion of testimony they asked to have re-read was the testimony of Agent Ng relating to the comments of Mr. Tu. The jury then convicted on the charges addressed by Agent Ng's testimony and acquitted on the charges not addressed by Agent Ng's testimony.

Finally, the Court of Appeals held that a charge to the jury of breach of fiduciary duty, a charge only appropriate in a *civil* case, satisfied the elements of either an intent to defraud or an intent to injure, which is required to obtain a criminal conviction for misapplying bank funds. According to the Court of Appeals, "willfulness" as a modifier of

misapplication of bank funds, did not require the Defendant's knowledge that his conduct was unlawful.

Four Questions Are Presented

1. Should the *Crawford v. Washington* standards and reasoning have precluded admitting into evidence an FBI Special Agent's recollection of his translation, from Mandarin into English, of the out-of-court, uncross-examined inculpating testimony of a co-defendant, who was present at the trial, but did not testify?

2. A conviction of misapplying bank funds requires the government to prove, beyond a reasonable doubt, that a defendant intended to injure or to defraud the bank. Did the jury instruction, which included a definition of a civil breach of fiduciary duty, satisfy either a definition of "intention to defraud" or "intention to injure?" Did the civil charge of breach of fiduciary duty exceed the reach of the criminal statute, which contains no such provision?

3. Was the jury's guilty verdict unconstitutional since the Court failed to charge that a verdict of "willfully" misapplying bank funds must entail a finding that the defendant knew the illegality of his acts?

4. Did the Second Circuit err in failing to find that the District Court made numerous errors that could not be considered harmless as they contributed to their verdict obtained?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Lung Fong Chen is a natural person.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

FOUR QUESTIONS ARE PRESENTED.....iii

LIST OF PARTIES.....iv

CORPORATE DISCLOSURE STATEMENT.....iv

TABLE OF CONTENTS.....v

TABLE OF CITED AUTHORITIES.....viii

TABLE OF APPENDICES.....xii

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTRUCTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....4

REASONS FOR ALLOWANCE OF THE WRIT.....7

1.
ADMITTING INTO EVIDENCE A WITNESS' RECOLLECTION OF THE TRANSLATION OF AN AVAILABLE CO-DEFENDANT'S OUT-OF-COURT TESTIMONIAL STATEMENTS VIOLATED MR. CHEN'S SIXTH AMENDMENT RIGHTS.....10

PAGE

A. *Crawford v. Washington* Applies to Mr. Chen's Case.....12

B. Agent Ng's Testimony Violated the Rule in *Bruton*.....15

C. New Rule or Old Rule, *Crawford* Applies to this Case.....19

2.
DEFENDANT CHEN WAS WRONGLY CONVICTED OF CRIMINAL CONDUCT BASED UPON A JURY INSTRUCTION RELATING TO THE *CIVIL* STANDARD APPLICABLE TO A BREACH OF FIDUCIARY DUTY.....20

A. Civil Remedies Are Available to the Government 20

B. Absent Specific Statutory Language, Breach of Fiduciary Duty May Not Be Charged to the Jury as an Element of the Crime.....21

3.
THE DISTRICT COURT'S CHARGE TO THE JURY FATALLY OMITTED THE ELEMENT OF INTENT TO INJURE OR DEFRAUD.....24

A. The Second Circuit Impermissibly Would Have Allowed the Jury to Infer Intent to Injure From an Inadequate Fraud Charge.....25

PAGE

B. The Jury Was Never Told That to Return a Guilty Verdict, They Had to Find Mr. Chen Had Guilty Knowledge.....26

C. There is No Fraud Without Deceit.....27

4.
THE MULTIPLE ERRORS MADE BY THE DISTRICT COURT CANNOT BE CONSIDERED HARMLESS AS THE ERRORS CONTRIBUTED TO THE VERDICT OBTAINED.....28

CONCLUSION.....30

TABLE OF CITED AUTHORITIES

FEDERAL CASES: **PAGE**

Arthur Andersen, LLP. v. United States,
544 U.S. __, Slip Opinion
May 31, 2005, page 9.....7, 27

Barber v. Page,
90 U.S. 719, 721 (1968).....14

Bockting v. Bayer,
399 F. 3d 1010, 1018-1022, (9th Cir. 2005).....20

Bousley v. United States,
523 U.S. 614, 620-621 (1998).....8, 24

Brookhart v. Janis,
384 U.S. 1 (1966).....19

Bruton v. United States,
391 U.S. 123 (1968).....10, 15, 16, 17, 19

Bryan v. United States,
524 U.S. 184, 193 (1998).....9, 27

Crawford v. Washington,
541 U.S. 36 (2004).... 7, 10, 12, 13, 14, 17, 18, 19, 20, 29

Cumbie v. Singletary,
991 F. 2d 715, 720 (11th Cir. 1993).....19

Delaware v. Van Arsdall,
475 U.S. 673 (1986).....9, 29

Gideon v. Wainwright,
372 U.S. 335 (1963).....19

PAGE

Gray v. Maryland,
523 U.S. 185 (1998).....15, 17, 18

Griffith v. Kentucky,
479 U.S. 314, 328 (1987).....13, 19

Harvest v. Castro,
121 Fed. Appx. 216, 219 (9th Cir. 2005).....15

Horton v. Allen,
370 F.3d 75 (1st Cir. 2004).....14

Howard v. Walker,
-- F. 3d --, 2005 WL 954884 (2d Cir. 2005).....13

Jackson v. Denno,
378 U.S. 368 (1964).....19

Johnson v. New Jersey,
384 U.S. 719, 727-728 (1966).....19

Lilly v. Virginia,
527 U.S. 116, 139 (1999).....14

Linkletter v. Walker,
381 U.S. 618, 639 (1965).....19

Lowe v. FDIC,
958 F. 2d 1526 (11th Cir. 1992).....21

Mattox v. United States,
156 U.S. 237, 242-243 (1895).....14

McNally v. United States,
483 U.S. 350, 360 (1987).....8, 21

PAGE

Mitchell v. Esparza,
540 U.S. 12, 18 (2003).....29

Ohio v. Roberts,
448 U.S. 56 (1980).....15, 18

Powell v. Nevada,
511 U.S. 79, 84 (1994).....13

Reck v. Pate,
367 U.S. 433 (1961).....19

Richardson v. Marsh,
481 U.S. 200 (1987).....16, 17

Roberts v. Russell,
392 U.S. 293 (1968).....19

Sullivan v. Louisiana,
508 U.S. 275, 278 (1993).....25

Stovall v. Denno,
388 U.S. 293, 298 (1967).....19

United States v. Booker,
125 S. Ct. 738, 769 (2005).....13

United States v. Bruno,
383 F. 3d 65, 79 (2d Cir. 2004).....29

United States v. Colton,
231 F. 3d 890, 898 (4th Cir. 2000).....28

United States v. De La Mata,
266 F. 3d 1275, 1299 (11th Cir. 2001).....27

PAGE

United States v. Docherty,
765 F. 2d 297 (2d Cir. 1985).....24

United States v. Evans,
42 F.3d 586, 591-92 (1994).....25

United States v. Lemons,
941 F. 2d 309, 314-315 (5th Cir. 1991).....28

United States v. Lung Fong Chen
393 F. 3d 139 (2nd Cir. 2005).....1

United States v. Pugh,
__F. 3d ___ 2005 U.S. App. LEXIS 759
(6th Cir. 2005).....14

United States v. Rybicki,
354 F. 3d 124, 134 (2d Cir. 2003).....8, 22

United States v. Schonberg, 396 F. 3d 1036, 1042
(9th Cir. 2004).....14

United States v. Unruh,
855 F. 2d 1363, 1373 (9th Cir. 1987).....25

Wood v. Georgia,
480 U.S. 261 (1981).....19

STATUTES **PAGE**

12 U.S.C. Section 1828(j)(4)(A), (B).....21

18 U.S.C. Section 371.....1, 4, 6, 20

PAGE

18 U.S.C. Section 656.....2, 4, 20, 26

18 U.S.C. Section 1005.....2, 4, 6, 20

18 U.S.C. Section 1346.....22

28 U.S.C. Section 1254 (1).....1

United States Constitution Amendment 6.....3

TABLE OF APPENDICES

Appendix A – Opinion Of The United States Court Of Appeals For The Second Circuit Dated December 22, 2004.....A-1

Appendix B – Order denying Petition for Panel Rehearing dated March 29, 2005.....A-30

Appendix C
18 U.S.C. Section 371.....A-33

Appendix D
18 U.S. C. Section 656.....A-35

Appendix E
18 U.S.C. Section 1005.....A-38

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *United States v. Lung Fong Chen, a/k/a Robert Chen, Joseph Liu, Schuman Tu*, 393 F. 3d 139 (2nd Cir. 2005). The Second Circuit affirmed the jury decision of the District Court for the Eastern District of New York, dated January 18, 2002.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

The Second Circuit's decision denying the appeal was rendered on December 22, 2004 (see Appendix A) and the Petition for Rehearing en banc was denied on March 29, 2005 (See Appendix B)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 United States Code, Section 371

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Title 18 United States Code, Section 656

Theft, embezzlement, or misapplication by bank officer or employee.

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or holding company, branch, agency, or organization or any moneys, funds, assets or securities entrusted to the custody or care of such bank or holding company, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $ 1,000,000 or imprisoned not more that 30 years, or both;

Title 18 United States Code, Section 1005

Bank entries, reports and transactions.

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of governors of the Federal Reserve System; or

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—…

United States Constitution Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The provisions of 18 U.S.C. Section 371, 18 U.S.C. Section 656 and 18 U.S.C. Section 1005 are lengthy and, therefore, set out in Appendix D, pursuant to Supreme Court Rule 14.1(f)

STATEMENT OF THE CASE

It has been said that "an idea is greater than any man, an idea is divine." The "idea" that a person is innocent until proven guilty beyond a reasonable doubt, and that in a Civil Court, the level of proof required to prevail is merely a preponderance of the evidence, is an idea which is a cornerstone of the foundation of American Jurisprudence. If we take our judicial system and subject it to the Garment Center Concept of "mix 'n match", we have a hodge-podge which jeopardizes our entire legal system and the liberty of our citizenry.

In the case at bar, the government had the opportunity to bring civil actions against officers and directors of GEB, but rather, it chose to prosecute the Petitioner as a "criminal" under the criminal statutes set forth in Title 18 of the United States Code. Having made that choice, the government was now required to abide by the exacting standards of proof required in a criminal prosecution and Petitioner was entitled to have a jury properly charged on the law as it applied to the criminal case against him.

That was not done in this case. The jury was charged as to civil responsibility, beyond language which is included in the criminal statute. And, in defending the District Court lapse, the Court of Appeals wrote a decision which mixes and matches and excuses significant error at the Trial Court

level. What is of paramount importance is that the error which was committed was not "harmless," but rocks the entire judicial system.

In this case, the District Court rulings allowed testimony which misled the jury; allowed redactions from testimony which misled the jury; and, the Court itself misled the jury at the most crucial time in the case by improperly charging the jury. The result? Distinguished and important members of the Taiwanese American Community in Flushing, New York were branded as "criminals" in a situation where the record clearly indicates that their conduct did not constitute any *criminal* offense. At best, they may have made a *civil* mistake which could have been pursued and remedied outside of the criminal justice system.

This case concerns the establishment of GEB in 1986 to meet the needs of the people in Flushing, Queens, New York and Chinatown in Manhattan. GEB serves, most notably, a close-knit community of Americans of Taiwanese heritage. Petitioner was a director of GEB from its inception. GEB has flourished and now owns assets nearly one-third of a *b*illion dollars and classified as a "large bank."

In 1984, the founders of GEB, including Mr. Chen, also formed SG, a real estate partnership which was changed to a corporation in 1989 (essentially GEB's landlord) in order to fund and oversee the construction of a headquarters building for GEB in Queens. At all times relevant herein the GEB board members fully disclosed to GEB their partnership interest with SG.

In 1990, GEB and SG entered into a lease agreement. The terms of that lease were fully disclosed to, and approved by, GEB's Board of Directors (including two additional GEB directors who were not also shareholders in SG) at an open door duly noticed meeting. As part of the lease arrangement,

GEB paid one million dollars to SG, reflecting: 1) Major commercial leasehold improvements which turned the new construction into a functioning bank; 2) a long-term, thirty-year lease; and 3) GEB's right of first refusal to purchase the bank building and property.

In a supplemental agreement, SG agreed to give GEB a one million dollar credit in the event that GEB exercised its right to purchase. Leasehold improvements, alone, were estimated in value, by expert witnesses, to be in the range of between four and five hundred thousand dollars, excluding an additional twenty percent to cover "soft costs." The long term lease and the right of first refusal to purchase had an estimated value of between three-quarters of a million and a million dollars.

As agreed, when GEB purchased the bank building, SG credited one million dollars toward the purchase price.

Despite the fact that the above-described transactions were transparent, not only to the GEB board, but also to federal bank examiners and New York State bank examiners, no civil complaints were ever filed. *A decade later*, based upon the 1990 lease agreement, the Justice Department caused four GEB directors, including Mr. Chen, to be indicted on: One count of conspiracy; one count of misapplying bank funds; and one count of making false entries in the books and records of a bank. A superseding indictment against Mr. Chen and Mr. Liu accused them of creating a false agreement years after the lease with GEB was executed to credit GEB with one million dollars when GEB exercised its option to purchase. The government said the agreement violated 18 U.S.C. Sections 371 and 1005. Mr. Chen and Mr. Liu were *acquitted* on these charges.

Nonetheless, and inexplicably, all four Defendants were convicted of the charges relating only to the 1990 lease. Mr. Chen was sentenced to eight months incarceration.

Mr. Chen was tried starting on January 9, 2001 with the jury rendering a verdict on February 22, 2001. Petitioner's Notice of Appeal was filed on January 16, 2002. The Second Circuit affirmed his convictions on December 22, 2004. Petition for rehearing was filed on January 24, 2005. Rehearing was denied on March 29, 2005.

REASONS FOR ALLOWANCE OF THE WRIT

Mr. Chen was deprived of his Sixth Amendment right to confrontation, in violation of *Crawford v. Washington.* Although defense counsel repeatedly sought severance and repeatedly objected, the trial court admitted into evidence the testimony of FBI Special Agent Herman Ng, which purported to set forth co-defendant Schuman Tu's out-of-court, uncross-examined, testimonial statements, inculpating Mr. Chen. Agent Ng said his testimony was based upon his recollections (he took no notes) of his Mandarin to English translations of Mr. Tu's testimony. Mr. Tu was present in court for the trial, but never took the witness stand.

The Second Circuit erroneously avoided a direct confrontation with *Crawford v. Washington,* 541 U.S. 36 (2004). According to the Second Circuit: 1) Mr. Tu's out-of-court testimony was referable to Mr. Chen purportedly via the introduction of other evidence; 2) the testimony had been redacted and a limiting instruction had been given to the jury; and 3) in any event, the testimony was reliable because it was claimed to be against Mr. Tu's penal interest. These are three of the very violations of the Confrontation Clause that *Crawford* sought to eliminate!

For this very reason, Petitioner's conviction should have been dismissed.

Further Mr. Chen was deprived of his substantive right to due process of law, guaranteed by the Fifth Amendment, based on instructions that allowed the jury to convict on the basis of a civil standard of breach of fiduciary duty, and without having to find, beyond a reasonable doubt, that Mr. Chen specifically intended to defraud or injure the bank or that he knew his conduct was illegal. Stated otherwise, he was convicted of conduct that the criminal statutes do not encompass.

In *Bousley v. United States,* 523 U.S. 614, 620-621 (1998), this Court held that even on collateral attack, this Court will grant certiorari where there is a "significant risk that a defendant stands convicted of an act that the law does not make criminal." (Internal quotation marks and citations omitted.)

This Court held, in *McNally v. United States,* 483 U.S. 350, 360 (1987), before one can be punished, it must be shown that his case is plainly within the statute. Congress specifically understood *McNally* to mean that the crimes of mail fraud and wire fraud could not be proved by establishing a breach of fiduciary duty. Thereafter, Congress amended the statutes for the express purpose of criminalizing that behavior, but *only* as it applies to mail and wire fraud. *United States v. Rybicki,* 354 F. 3d 124, 134 (2d Cir. 2003).

For these reasons, it is respectfully submitted that this Court should afford relief to Mr. Chen for these violations of his substantive right to due process of law.

Additionally, the District Court sought to *infer* "intent" by juxtaposing the "willfulness" requirement with the fraud requirement. There are, however, two vital missing

links: under "willful", knowledge that the conduct complained of was illegal was not charged, and under "fraud," having a specific intent to deceive was not charged.

The criminal statute at bar clearly modifies the word "misapply" with the word "willful." In Mr. Chen's case, the Second Circuit stated that "willful" may have different meanings in different contexts. Yet, this Court held in *Bryan v. Unites States*, 524 U.S. 184, that to be found guilty of the element of willfulness "the jury must find that the Defendant acted with an evil-meaning mind, that is to say that he acted with knowledge that his conduct was unlawful." 524 U.S. at 193. (Internal quotation marks and citations omitted.)

Thus, deliberate approval of a lease without intent to injure the bank, let alone without intent to act with "an evil-meaning mind," represents a constitutionally insufficient jury instruction. See also, *Arthur Andersen, LLP. v. United States,* 544 __ U.S. __, Slip Opinion May 31, 2005, page 9.

Finally, a trial error *cannot* be harmless if there is a reasonable possibility that the improperly admitted evidence contributed to the conviction. Harmless error means harmless beyond a reasonable doubt. See *Delaware v. Van Arsdall,* 475 U.S. 673 (1986).

The District Court erroneously allowed the jury to hear out-of–court, uncrossexamined, inculpating testimony; charged the jury on a civil charge of breach of fiduciary duty where the criminal statute contained no such provision; and failed to correctly charge that misapplying bank funds must entail a finding that Mr. Chen knew the illegality of his acts. A review of the record shows that these errors, were the sole and only impetus which lead to the conviction of Mr. Chen.

1. ADMITTING INTO EVIDENCE A WITNESS' RECOLLECTION OF THE TRANSLATION OF AN AVAILABLE CO-DEFENDANT'S OUT-OF-COURT TESTIMONIAL STATEMENTS VIOLATED MR. CHEN'S SIXTH AMENDMENT RIGHT

The District Court deprived Mr. Chen of his Sixth Amendment right to confront his accuser by allowing an FBI agent to testify, over strenuous objections, as to statements made by Co-Defendant Schuman Tu in an interview held by FBI agents. The circumstances of that interview may be unique in the annals of jurisprudence.

The Court of Appeals held that there was neither a *Bruton* (*supra*) nor a *Crawford* (*supra*) error as, in the case at bar, there was "substantial evidence used to link [Chen and Liu] to Tu's statements." See Court of Appeals Decision dated December 22, 2004 at P. 17. However, there was little or no evidence against Mr. Chen and Mr. Liu. This lack of substantial evidence amplified the effect of Agent Ng's testimony causing it to be the *sole* direct testimony of Mr. Chen and Mr. Liu's state of mind. By allowing Agent Ng's testimony, the jury was permitted to rely on the out of court statements by a defendant who was trying to save himself, by shifting the blame to other members of the board, i.e., Chen and Liu, without the opportunity for Petitioner to cross-examine or confront him.

With no direct evidence to prove Mr. Chen and Mr. Liu's state of mind regarding intent, the only other evidence of this offered was by Mr. Lee and Mr. Wang, which as the Court of Appeals put it "suggest[ed] that Chen and Liu had the necessary intent." (See the Panel's decision at P. 18) A "suggestion" is far from any direct evidence and is even farther from establishing "substantial evidence".

The interview with Mr. Tu was never subject to cross-examination, either before the interview was taken, before trial or at the trial, where Mr. Tu was tried along with Mr. Chen and Mr. Liu. Mr. Tu's interview was held at the behest of FBI agent, Mike Zambito, who was in charge of a case. The interview was conducted mostly in Mandarin by FBI Special Agent Herman Ng who professed to speak Mandarin fluently, although his first language was Cantonese. Agent Ng admitted that he was not a court-certified translator. Agent Ng took no contemporaneous notes, rather Mr. Zambito took notes. Prior to testifying in Court, Agent Ng discussed the case with the prosecution and *had reviewed Mr. Zambito's notes.*

Speaking to the jury, the Court purported to limit Agent Ng's account of what he had heard from Mr. Tu only to the issue of Mr. Tu's guilt. Counsel, who had previously sought severance of the trials, objected to the futility of the limiting instruction, just as he had objected to the introduction of any of Agent Ng's testimony.

The trial court was concerned about the Sixth Amendment implications of Agent Ng's testimony so Agent Ng's testimony was rehearsed, out of the presence of the jury. Yet, in the Jury's presence, Agent Ng's recollection of Mr. Tu's interview ascribed criminal intent to the entire Board of Directors of the Bank. According to Agent Ng, Mr. Tu said the lease was an "inside transaction;" that "it was not right and it was the wrong thing to do;" that the Board of Directors had transferred money to themselves, which "was a wrong thing to do;" that the reasons given for the lease were "not right and wrong." See Court of Appeals Decision dated December 22, 2004 at P. 14.

According to Agent Ng, Mr. Tu said there was no leasehold improvement, that all construction costs had been at the expense of GEB, and that the landlord's costs were

minor and did not approach one million dollars. Mr. Tu was also reported to have said that the extension of a 30-year lease to GEB by SG, and the guarantee of first refusal to purchase the building were "wrong and not right reasons." All this, the jury heard.

Moreover, the jury also heard that Mr. Tu said that these reasons, as reflected in the minutes of the Board, were "fake," "falsely made to cover up the transaction." Mr. Tu also allegedly said that at a meeting of the Board, the Board, itself, had concluded that the lease "was the wrong thing to do as the Board of Directors," and went against their duties.

The jury was told that they were *to be deemed stricken* from the record. However, as this Court is well aware, a juror cannot *un-hear* testimony. The damage was done and could not be undone.

A. Crawford v. Washington Applies to Mr. Chen's Case.

This Court's decision, *Crawford v. Washington,* 541 U.S. 36 (2004), observed that merely allowing cross-examination of a witness who reports on an out-of-court statement by a co-defendant "would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51. In the case at bar, Agent Ng was not even reading from a transcript or from his notes: his recollections were purportedly *refreshed by reading Agent Zambito's notes*, which contained Agent Zambito's opinions regarding Mr. Tu's Mandarin testimony.

That is why Agent Ng was, himself, rendered confrontation-proof.[1] For example, his repeated use of what

---

[1] Agent Ng was testifying, essentially, as a quasi-expert witness, as to the accuracy of Mr. Tu's un-cross-examined out-of-court testimony. In

he said were the Mandarin terms for fake (*bu dui*) and for wrongdoing (*jiade*) lent an air of authenticity to Agent Ng's testimony. Even if the terms were translated correctly, without cross-examination, there was no way to ascertain the precise context in which Mr. Tu had used those words. Nor was there any way to test Mr. Tu's credibility or Mr. Tu's likely motive for currying favor and shifting blame.

Whether or not *Crawford* announced "a new rule," *Crawford* applies to Mr. Chen's case because his case was still pending appeal when *Crawford* was decided. *Powell v. Nevada,* 511 U.S. 79, 84 (1994); *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). See *United States v. Booker,* 125 S. Ct. 738, 769 (2005). The decision date of *Crawford* was March 8, 2004. The decision date of the Second Circuit's affirmance of Mr. Chen's conviction was December 22, 2004.

Crawford held that a distinction may be made between two types of out-of-court statements, those that are testimonial and those that are not. Included among testimonial statements are those given under circumstances congruent with Mr. Tu's statements to the FBI. "Statements taken by [law enforcement] officers in the course of interrogations are...testimonial." 541 U.S. at 52-53. *Crawford* holds that testimonial statements that were not subject to cross-examination and where the witness is not unavailable, are flatly to be excluded. 541 U.S. at 68. Mr. Tu's reported statements were made to FBI agents investigating GEB and Mr. Tu was available.

Howard v. Walker, - - F. 3d - -, 2005 WL 954884 (2d Cir. 2005), although the Second Circuit declined to make a broad ruling based upon *Bruton* and *Crawford*, they expressed great concern as to whether expert testimony based upon unreliable out-of-court confessions could withstand constitutional challenge. Ibid. at 12.

There is hardly a more disingenuous argument than the one proffered by the government and accepted by the Second Circuit to the effect that Mr. Tu's testimony was to be admitted solely as evidence of *his* state-of-mind. The First Circuit reviewed the bona fides of a state-of-mind hearsay exception in *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004). To be admissible, state-of-mind exceptions to the hearsay rule *cannot* be testimonial. To be admissible, such statements must be characterized by the "probable sincerity" engendered by spontaneity, and they must have been made "without motive to reflect on the legal consequences of [the] statements and in situations that are exceptionally conducive to veracity." 370 F. 3d at 85. See *United States v. Pugh,* ___ F. 3d ___ 2005 U.S. App. LEXIS 759 (6th Cir. 2005).

Beyond lack of spontaneity, there are other indicia of the unreliability of Mr. Tu's statements. Indeed, self-inculpation is no sign of reliability, *Crawford*, supra, 541 U.S. at 62. Cross-examination is required to bring out a witness's incentive to please the government, and not only to bring out a witness's bias, but also the reasons for that bias. *United States v. Schonberg,* 396 F. 3d 1036, 1042 (9th Cir. 2004). There need be no overt promise of leniency to infer bias. *Lilly v. Virginia*, 527 U.S. 116, 139 (1999).

This Court has long since settled the importance of the relationship between a witness's testimony and its effect on the jury. See *Mattox v. United States, 156 U.S. 237, 242-243 (1895). Barber v. Page,* 390 U.S. 719, 721 (1968).

Mr. Tu's alleged statements were essentially offered to bolster the indictment, because there was nothing else. Moreover, even if there were evidence corroborating the truth of Mr. Tu's hearsay statement, that would not provide confidence of its trustworthiness. *Lilly v. Virginia*, 527 U.S. 116, 137-138 (1999).

What an alleged accomplice has to say about another Defendant, out-of-court and un-cross-examined, is *less* reliable than ordinary hearsay. *Harvest v. Castro,* 121 Fed. Appx. 216, 219 (9th Cir. 2005) (applying *Ohio v. Roberts,* 448 U.S. 56 (1980)). Thus, even under the *Roberts* reliability test, Mr. Tu's reported testimony would have been inadmissible.

B. Agent Ng's Testimony Violated the Rule in Bruton.

This Court held, in *Bruton v. United States,* 391 U.S. 123 (1968) that the admission of a co-defendant's out-of-court self-implicating testimony against another defendant violates the latter defendant's Sixth Amendment right to confront the witnesses against him. Subsequently, enterprising Maryland prosecutors gained admission into evidence of such an out-of-court confession by redacting the name of the co-defendant. In *Gray v. Maryland,* 523 U.S. 185 (1998), this Court held that that redaction was not enough, where the jury could infer the reference to the co-defendant, even though the state court had instructed the jury that the confession was to be addressed by them solely when considering the guilt of the confessing defendant.

In Mr. Chen's case, the issue was more serious because Mr. Tu's testimony was not actually before the Court or the jury. What was actually being redacted was Agent Ng's impressions of Agent Zambito's impressions of what Mr. Tu had said -in Mandarin. Thus, Mr. Tu's reported statements were given added cachet because they came from an FBI agent. The government's accusations were leveled against all three Defendants. An instruction limiting Agent Ng's testimony to Mr. Tu could not have been effective due to the very circumstances that appertained to the trial.

The Court of Appeals held that this case falls outside of *Bruton*, supra, because "substantial evidence was necessary to link defendants Chen and Liu to Tu's statements regarding the Board." See Court of Appeals Decision dated December 22, 2004 at P. 20. It is respectfully urged that this statement by the Court of Appeals is inaccurate and not supported by the record. Mr. Chen and Mr. Liu were members of the Board...an uncontroverted fact. No further evidence was necessary to "link them" to Mr. Tu's statements. When he spoke of the Board, he spoke of Mr. Chen and Mr. Liu.

In affirming the lower Court's decision, the Court of Appeals relied on *Richardson v. Marsh,* 481 U.S. 200 (1987) to determine that the Judge's redaction of certain testimony of Agent Ng with an instruction to the jury would suffice. Here the Court of Appeals misapplied the law. In *Richardson*, the Court *found* other direct evidence, to satisfy the Court that no Sixth Amendment right had been breached.

At bar, the facts are wholly inapposite. First, as the Court of Appeals noted, there is little to no direct evidence of Chen or Liu's intent. In fact, the only direct testimony leading the jury down the path to the Appellants' state of mind was the testimony of Agent Ng referencing Mr. Tu's out of court statements. As this Court is aware, the jury heard and was aware that Agent Ng testified that "they found that it was the wrong thing to do as the Board of Directors. It was against the duties as the Directors of a bank" and "Mr. Tu told me that it's fake. It's falsely made up to cover the transaction." See Court of Appeals Decision dated December 22, 2004 at P. 19.

Although these statements were stricken from the record the damage was already done and a *Bruton* violation occurred. This is evidenced by the simple fact that the jury

asked for Agent Ng's testimony of Mr. Tu and thereafter *immediately* found Chen and Liu guilty of the charges related to that testimony, after they had *twice* reported that they were deadlocked.

It is respectfully submitted that the Second Circuit's reliance upon *Richardson v. Marsh,* 481 U.S. 200 (1987) was inapt. The proper comparison is not between *Richardson* and *Crawford*, but between *Richardson* and *Gray*, supra, which was decided more than a decade later. While *Richardson* allowed for the admission of some un-cross-examined co-defendant testimony, with limiting instructions, *Gray* narrowed the scope of what is permissible. Where the out-of-court inculpating statement is directly referable to another defendant, a limiting instruction will not suffice. 523 U.S. at 192. In this regard, *Gray* overrules *Richardson* (which relied upon the efficacy of redaction). 481 U.S. at 209. And, *Gray* is analogous to the case at bar.

Moreover, the portions of Agent Ng's testimony that were redacted fall into two categories, what he did say in Court and what he did not say in Court. Some of what he said went beyond agreed limits, so that the jury heard, but was told to disregard, those remarks. What Agent Ng did not say, in no way detracted from his calling attention to the fact that Mr. Tu was identified as a Board member, and that he had been called by the F.B.I. to speak as a Board member and to say that each of the Board members had been engaged in wrongdoing.

As this Court observed in *Bruton*:

> In joint trials...when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or

> innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant...It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.

391 U.S. at 130-131 (citation and quotation marks omitted).

Agent Ng's testimony that Mr. Tu claimed: "To transfer the money to themselves, the Board of Directors, it was a wrong thing to do" which was a line that was *not redacted*, caused significant and irreparable damage and prejudice to Mr. Chen and his co-defendants, who were charged of conspiracy as the members of GEB board.

Indeed, the limiting instruction, itself, may encourage the jury to speculate about the reference and overemphasize the importance of the out-of-court statement. *Gray v. Maryland*, supra, 523 U.S. at 193.

C. New Rule or Old Rule, *Crawford* Applies to this Case.

There are only two possibilities: *Crawford* is not a "new rule," because it restores the Confrontation Clause to the meaning intended by the Framers of the Sixth Amendment, a development well-supported by earlier Supreme Court case law. Second, by abrogating *Ohio v. Roberts,* supra, *Crawford* is viewed as restating a fundamental constitutional principle, then its holding allows for the grant of certiorari, where its violation infected Mr. Chen's trial with constitutional error. See *Wood v. Georgia,*

480 U.S. 261 (1981). Were *Crawford* to be held to have announced a new rule, then according to the standard set forth in *Griffith v. Kentucky,* supra, its holding applies to Mr. Chen's case, because his case was on appeal when *Crawford* was first announced. See also, *Cumbie v. Singletary,* 991 F. 2d 715, 720 (11th Cir. 1993).

In the unlikely event this Court were to hold that the *Crawford* decision is not directly applicable to Mr. Chen's case, then it is respectfully requested that this Court apply *Crawford* retroactively, because the decision therein is fundamental to the concept of a fair trial; i.e., the introduction of constitutionally barred testimony creates reasonable doubt, per se.

The clearest expression of why *Crawford* should be applied retroactively is set forth in *Roberts v. Russell,* 392 U.S. 293 (1968), which held that *Bruton* was to be applied retroactively.

> We have...retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. *Stovall v. Denno,* 388 U.S. 293, 298 (1967). See *Jackson v. Denno,* 378 U.S. 368 (1964), *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Reck v. Pate,* 367 U.S. 433 (1961); *Linkletter v. Walker,* 381 U.S. 618, 639 (1965) n. 20; *Johnson v. New Jersey,* 384 U.S. 719, 727-728 (1966); cf. *Brookhart v. Janis,* 384 U.S. 1 (1966). Despite the cautionary instructions [limiting the confession solely to the declarant], the admission of a defendant's confession which implicates a co-defendant results in such a serious flaw. The retroactivity of the holding in *Bruton* is therefore required; the error went to the basis of fair hearing and trial because the procedural apparatus never assured the petitioner a fair determination of his

guilt or innocence. 329 U.S. at 294 (internal quotes omitted).

Were *Crawford* deemed to have set forth a "new rule," the opinion, *itself*, states that the confrontation clause is a "bedrock procedural guarantee." 541 U.S. at 42. The Ninth Circuit has held *Crawford* to be retroactive. *Bockting v. Bayer*, supra, 399 F. 3d at 1016.

Thus, in view of *Crawford*, Mr. Chen's convictions should be overturned.

2. DEFENDANT CHEN WAS WRONGLY CONVICTED OF CRIMINAL CONDUCT BASED UPON A JURY INSTRUCTION RELATING TO THE *CIVIL* STANDARD APPLICABLE TO A BREACH OF FIDUCIARY DUTY

A. Civil Remedies Are Available to the Government.

The United States government has two broad-based options for enforcing the federal banking laws. The Federal Deposit Insurance Corporation ("FDIC") *e.g.*, may seek *civil* remedies against individuals engaged in banking. The Department of Justice may bring *criminal* charges against individuals engaged in banking. It is impermissible, however, for the government to pursue a criminal proceeding while relying on a *civil* standard for breach of fiduciary duty, and then benefit from the Judge's charge to the jury that finding such a civil breach of fiduciary duty would satisfy the criminal elements of 18 U.S.C. Section 371, 18 U.S.C. Section 656, and 18 U.S.C. Section 1005. That is precisely what happened in Mr. Chen's case and that is precisely why Mr. Chen's conviction should be overturned.

The government's civil remedies are stringent. For example, in *Lowe v. FDIC*, 958 F.2d 1526 (11th Cir. 1992), Mr. Lowe was director of, and principal shareholder in, a Georgia bank. The FDIC issued an order assessing civil money penalties against Lowe and another director, pursuant to the Federal Deposit Insurance Act, 12 U.S.C. Section 1828(j)(4)(A), (B), for violating the statutory duties of bank directors in policing insider loans.

The existence of a plethora of such civil remedies, available to enforce bank-related statues and regulations, underscores the point that in a *criminal* case, the Court must instruct a jury that to convict a defendant of a crime, the jury has to find culpability far more grave than in the case of a civil violation.

B. Absent Specific Statutory Language, Breach of Fiduciary Duty May Not Be Charged as an Element of the Crime.

Before one can be punished, it must be shown that his case is plainly within a statute. So held this Court in *McNally v. United States,* 483 U.S. 350, 360 (1987). Interpreting "schemes to defraud," as set forth in the mail fraud statue (18 U.S.C. Section 1341), the *McNally* Court held that the words, to defraud, "commonly refer to wronging one in his property rights by dishonest methods or schemes and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." 483 U.S. at 358 (internal quotation marks and citation omitted). Schemes to defraud do not "include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly." *Ibid.*

Thereafter, Congress amended the definition of "scheme or artifice to defraud" to include a scheme or

artifice to deprive another of the intangible right of honest services. *United States v. Rybicki,* 354 F. 3d 124, 134 (2nd Cir. 2003) (discussing 18 U.S.C. Section 1346, which so amends the wire fraud and mail fraud sections). However, breach of fiduciary duty has solely been incorporated by Congress as an element of wire and mail fraud- neither of which Mr. Chen was indicted on.

At Mr. Chen's trial, District Court Judge Korman charged the jury as follows:

> To act with the intent to defraud is to act knowingly and deliberately for the purpose of taking a financial advantage of a fiduciary relationship.
>
> A bank officer or director is a fiduciary of the bank. As such, he owes loyalty and allegiance to the bank. A loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the bank.
>
> He may not profit at the expense of the bank and in conflict with its rights. While related-party transactions are not prohibited, a director acts with the intent to defraud the bank if he knowingly and deliberately uses his position to obtain money belonging to the bank for himself or others, for which the bank does not receive a comparable benefit or value in return.
>
> In the present case, in order to determine whether the defendants deliberately took advantage of the fiduciary relationship with the Great Eastern Bank to obtain money of the bank for the benefit of Seven Giants and for themselves, it is not enough to conclude that the bank overpaid Seven Giants or that it made a bad business decision.

> In the course of our life's experience, we sometimes obtain a bargain because someone unknowingly failed to judge the value of the goods or property he sold us and sometimes we ourselves overpay because we mistakenly overvalue the goods or property we purchase.
>
> What is necessary here to find the requisite element of the intent to defraud is (1) that a defendant deliberately used his position as a director of the Great Eastern Bank to cause the bank to pay one million dollars as part of the lease transaction to Seven Giants, and (2) that the defendant knew that the one million dollars paid was substantially more than the value of what a person, totally unrelated to Seven Giants, would have paid for what Great Eastern Bank received in return from Seven Giants.[2] See Court of Appeals Decision dated December 22, 2004 at P. 11.

It is respectfully submitted that the charges were both inappropriate and incomplete since Judge Korman charged the Chen jury with the standards to adjudge the crimes of mail/wire fraud when the indictment against Mr. Chen contained no such charges. It is obvious by the length of time taken by the Court of Appeals to decide this case (almost 2 years) that the Court struggled with some of the issues with which it was presented.[3] It is also obvious, in reading the decision, that the Lower Court's charge on the issue of "intent" under Section 656 was not a great charge but the Court of Appeals decided to forgive and accept it. It is

---

[2] The Court will note that this definition of fraud omits entirely the element of deceit. That omission further invalidates the charge, as discussed, infra.

[3] It has been said that justice delayed is justice denied.

respectfully urged that in a criminal case where two out of the five charges were dismissed by the jury, and the jury reported itself deadlocked *twice* as to the other charges, that the Court of Appeals should not have been so lenient in reviewing Judge Korman's charge.

There is every likelihood that because of Judge Korman's charge, Mr. Chen was convicted on the basis of conduct which, even if accurately summarized by the Court, should have risen only to the level of a *civil* breach of fiduciary duty. Stated otherwise, absent an enactment by Congress, Judge Korman's charge created "a significant risk that [Mr. Chen stood] convicted of an act that the law does not make criminal." *Bousley v. United States,* 523 U.S. 614, 620-621 (1998) (internal quotation marks and citations omitted).

3. THE DISTRICT COURT'S CHARGE TO THE JURY FATALLY OMITTED THE ELEMENT OF INTENT TO INJURE OR DEFRAUD

It is agreed that the crime of misapplying bank funds requires proof beyond a reasonable doubt that the Defendant intended to defraud or injure the bank. *United States v. Docherty*, 765 F. 2d 297 (2d Cir. 1985). At Point II, it has been established that the District Court Judge's charge relating to the meaning of "defraud" was merely the definition of a civil breach of fiduciary duty.

The District Court sought to *infer* "intent" by juxtaposing the "willfulness" requirement with the fraud requirement. There are, however, two vital missing links: under "willful", knowledge that the conduct complained of was illegal was not charged, and under "fraud," having a specific intent to deceive was not charged.

A. The Second Circuit Impermissibly Would Have Allowed the Jury to "Infer" Intent to Injure From an Inadequate Fraud Charge.

At Page 12 of the reported Second Circuit opinion, herein, Judge Pooler opined that the charge that amounted to a civil breach of fiduciary duty, although explained to the jury as a definition of fraud, satisfied the alternate requirement of proving intent to injure. Judge Pooler cited *no cases* for the proposition that an inadequate fraud charge could substitute for an intent-to-injure charge because there are no such precedents. The concept that a charge to the jury that is tantamount to "close enough" is not subject to the "harmless error" analysis because such judicial reasoning is analogous to declaring that a jury may find a defendant "*probably* guilty," which is a denial of due process of law. *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993) (emphasis in original).

In this case, there was no straightforward charge of an intent to injure the bank because the evidence would simply not have sustained a conviction on such grounds. *United States v. Evans,* 42 F.3d 586, 591-92 (1994). Simply charging a jury that a defendant must have intended the probable consequences of his actions, without also charging that he actually intended those consequences "could easily be interpreted by a reasonable juror to compel that inference." *United States v. Unruh,* 855 F. 2d 1363, 1373 (9th Cir. 1987).

Moreover, almost all the shareholders of GEB were the founder/initial Board of Directors themselves, their family members and close friends. To defraud the Bank is the same as defrauding themselves, their family and friends. Furthermore, this bank was created to help the community and it has grown and helped the community just as Mr. Chen and the other shareholders planned.

The Court of Appeals ignored the value of the supplemental agreement which credited one million dollars to the bank should they purchase the property, even though *the jury acquitted the appellants of wrongdoing with regard to that supplemental agreement.* The Government argued that the supplemental agreement was created as a belated attempt to cover up wrongdoing. Yet the jury acquitted on those two counts, so they must have rejected the cover up theory altogether. Therefore, the value of the credit of the money becomes an overwhelming piece of evidence belying criminal intent and indeed illustrates innocence.

B. The Jury Was Never Told That to Return a Guilty Verdict, They Had to Find Mr. Chen Had Guilty Knowledge.

In Title 18 U.S.C. Section 656 "misapply" is plainly modified with the word "willful." At Page 15 of the Second Circuit decision, Judge Pooler opined that the District Court's definition of "willful," in the jury charge, was satisfied by allowing the jury to find that "deliberate" approval of the lease equates to willfulness. Judge Pooler's decision implies that, a jury need not be told that to find a defendant guilty of misapplying bank funds, that they had to find defendant knew beyond a reasonable doubt that his conduct was unlawful.

The Second Circuit's conclusion follows from a false premise, namely, that unlawful intent might be inferred from the charge relating to fraud. However, since the actual words used by the District Court Judge to define fraud were the same as those of a civil breach of fiduciary duty, his definition of "willful" could not logically trade on the fraud definition.

In Mr. Chen's case, the Second Circuit stated that "willful" may have different meanings in different contexts. Yet, this Court held in *Bryan v. Unites States*, 524 U.S. 184, that to be found guilty of the element of willfulness "the jury must find that the Defendant acted with an evil-meaning mind, that is to say that he acted with knowledge that his conduct was unlawful." 524 U.S. at 193. (Internal quotation marks and citations omitted.)

Thus, deliberate approval of a lease without intent to injure the bank, let alone without intent to act with "an evil-meaning mind," represents a constitutionally insufficient jury instruction. See also, *Arthur Andersen, LLP. v. United States,* 544 __ U.S. __, Slip Opinion May 31, 2005, page 9.

As recently observed by this Court, in a slightly different context, "limiting criminality to persuaders conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of culpability we usually require in order to impose criminal liability." *Arthur Andersen, LLP v. United States,* 544 U.S. ___, Slip Opinion, May 31, 2005, page 9.

C. There is No Fraud Without Deceit.

As previously noted, the District Court Judge's charge relating to the term "defraud" did not include the concept of deceit. Violation of the statutes upon which Mr. Chen was found guilty requires that the jury be charged that they must find beyond a reasonable doubt, that the Board of Directors of the bank had been deceived by Mr. Chen. *United States v. De La Mata,* 266 F. 3d 1275, 1299 (11th Cir. 2001).

There cannot exist a scheme to defraud unless the jury finds beyond a reasonable doubt that the Defendant used fraudulent pretenses or misrepresentations *intending* to

deceive others to obtain something of value, such as money, from the institution to be deceived-there must have been some fraudulent pretense or misrepresentation. *United States v. Lemons,* 941 F. 2d 309, 314-315 (5th Cir. 1991).

A scheme to defraud requires suppression of material facts so as to foster a misleading or false impression for the purpose of gaining a bank's reliance. Cf. *United States v. Colton*, 231 F. 3d 890, 898 (4th Cir. 2000). Mere nondisclosure will not suffice; there must be an *active* purpose to deceive. Ibid. at 899.

Since there was no evidence whatsoever to link Mr. Chen to a deception of either the bank, or its Board of Directors, not only were the jury charges inadequate, there was insufficient evidence to convict Mr. Chen of anything.

4. THE MULTIPLE ERRORS MADE BY THE DISTRICT COURT CANNOT BE CONSIDERED HARMLESS AS THE ERRORS CONTRIBUTED TO THE VERDICT OBTAINED

As discussed, supra, the District Court committed numerous errors during the trial of Mr. Chen which lead to his conviction. Specifically, as propounded throughout this submission, the District Court erroneously allowed the jury to hear the out-of–court, uncrossexamined, inculpating testimony of an available co-defendant; charged the jury on a civil charge of breach of fiduciary duty where the criminal statute contained no such provision; and failed to correctly charge that misapplying bank funds must entail a finding that Mr. Chen knew the illegality of his acts. A review of the record shows that these errors, both individually and as a whole, were the sole and only impetus which allowed the jury to find Mr. Chen guilty.

An error is only considered harmless when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (internal citations omitted).

This Court, in *Delaware v. Van Arsdall,* held that prejudice affecting a jury verdict requires a determination based upon the failure to cross-examine an individual witness, not prejudice in connection with the trial, as a whole. 475 U.S. at 679-680. Cross-examination that could expose a witness' bias, to allow the jury to draw an inference as to his credibility, is precisely the right protected by the Confrontation Clause.

At bar, the most critical piece of testimony was not provided by an eyewitness, but by an FBI agent who translated statements made by a self-serving individual who sought to protect himself. Mr. Tu's reported statements encapsulated Mr. Chen within the conspiracy charged and set Mr. Chen well within the zone of culpability. It was Agent Ng, speaking of Mr. Tu, who brought the jury the only unimpeached eye witness evidence couched in an assessment of wrongfulness and intent.

Moreover, where a supervening judicial decision, (referring to *Crawford*), alters a settled rule of law, the burden falls upon the government to prove that an error is harmless beyond a reasonable doubt. *United States v. Bruno*, 383 F. 3d 65, 79 (2d Cir. 2004). Admission of a co-conspirator's allocution tended to tie the defendant to the corrupt scheme; hence the violation of the Confrontation Clause was not harmless.

Furthermore the District Court failed to instruct the jury on intent to injure, failed to instruct the jury on intent to deceive, failed to instruct the jury that "willfulness" must entail knowledge of the illegal nature of the conduct and

improperly allowed the jury to deliberate on a civil charge of fiduciary duty.

These errors do were not harmless, rather they clearly contributed to the guilty verdict obtained.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

Emanuel R. Gold*
Edward Vitale
Howard Levine
Law Offices of Emanuel R. Gold
108-18 Queens Blvd.
Forest Hills, New York 11375
(718) 897-7300
*Counsel of Record
Attorneys for Petitioner

APPENDIX

Appendix A – Opinion Of The United States Court Of Appeals For The Second Circuit Dated December 22, 2004

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 6, 2003 Decided: December 22, 2004)

Docket Nos. 02-1055 (L), 02-1056(Con.), 02-1073(Con.), 02-1124(XAP)-Closed

---

UNITED STATES OF AMERICA,

Appellee,

v.

LUNG FONG CHEN aka Robert Chen, JOSEPH LIU, and SCHUMAN TU,

Defendants-Appellants.

Before: WALKER, Chief Judge, POOLER, Circuit Judge, and GLEESON, District Judge.*

Appeal from the January 18, 2002, judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, Chief Judge), convicting defendants after a jury trial of conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371, misapplication of bank funds in violation of 18 U.S.C. § 656, and making false entries in bank records in violation of 18 U.S. C. § 1005.

Affirmed.

STEVEN D. GORDON, Holland & Knight, LLP, New York, N.Y. (Jerry D. Bernstein and Michael N. Donofrio on the brief), for Defendant-Appellant Liu.

ALAN M. COHEN, O'Melveny & Myers LLP, New York, N.Y. (JaneAnne Murray and Jeremy Maltby, on the brief) for Defendant-Appellant Chen.

LARRY H. KRANTZ, Krantz & Berman, LLP, New York, N.Y. (Marjorie E. Berman and Mary Lou Chatterton, on the brief) for Defendant-Appellant Tu.

KENNETH BREEN, Assistant United States Attorney, Eastern District of New York, Brooklyn, N.Y. (Barbara D. Underwood, Chief Assistant United States Attorney, Peter A. Norling and Jonathan S. Sack, Assistant United States Attorneys, on the brief), for Appellee.

---

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

Pooler, Circuit Judge:

Lung Fong Chen, Joseph Liu, and Schuman Tu appeal from the January 18, 2002, judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, Chief Judge), convicting them after a jury trial of conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371, misapplication of bank funds in violation of 18 U.S.C. § 656, and making false entries in bank records in violation of 18 U.S.C. § 1005. Chen and Liu contend that the district court's instruction on the intent element of misapplication of bank funds was erroneous. They also argue that statements of non-testifying codefendant Tu were admitted in violation of the Confrontation Clause and that the evidence was insufficient to convict them. Tu challenges the district court's failure to give two charges that reflected his theory of the defense. We find that the district court properly instructed the jury on the intent necessary to support a conviction for misapplication of bank funds. We also find that there was no Confrontation Clause violation, and that the evidence was sufficient to allow the jury to reach a guilty verdict. Finally, we hold that the district court did not err in refusing to give Tu's jury instructions. We therefore affirm.

BACKGROUND

This case involves a lease agreement entered into by the Great Eastern Bank ("GEB") and the Seven Giants Company ("Seven Giants"). The members of the GEB Board of Directors ("the Board") and the partners of Seven Giants overlapped a great deal, and all three appellants were members of the Board and partners in Seven Giants. Defendants Chen, Liu, and Tu were all experienced in business, with backgrounds, respectively, as a real estate attorney, a certified public accountant, and a management professor and Wall Street consultant. Although all three

defendants, along with others, had been central to the founding of the bank, a later power struggle had significantly decreased Tu's status at GEB by the time of the relevant events.

The lease in question involved a property on Main Street in Flushing, New York. Chen and Tu had acquired the property in the early 1980s. At Chen and Tu's urging, the GEB founders agreed to locate the bank's headquarters at the property. Concerned about the concentration of power in the hands of Chen and Tu, GEB's founders formed Seven Giants as the entity that would own the Property. Completion of the headquarters building took several years, and GEB moved into the space in December 1989 pursuant to the lease at issue in this case.

In November of 1989, the Board authorized GEB's management team ("Management Team"), consisting of Chen, Liu, and Wen Y. Chen (a fourth codefendant in this case who has not appealed his conviction), to negotiate a lease of the headquarters property. The terms were supposed to be based on an independent appraisal created by Bradley & Co Appraisers, Inc. ("Bradley Appraisal"). The lease "negotiated" between GEB and Seven Giants was for a thirty-year term, with rental increases that were significantly above market according to the Bradley Appraisal's findings. The convictions in this case involve an upfront payment of one million dollars from GEB to Seven Giants in connection with this lease ("the million dollar payment"). A one-page agreement memorialized the terms of the million dollar payment and noted that the payment was reimbursement for: ("leasehold improvement to the Demised Premises for the sole benefit of Tenant"; (2) "a thirty (30) years lease instead of the Ten (10) years lease originally offered by Landlord"; and (3) "the right of first refusal in the event Demised Premises is for sale."

A short while after GEB had entered into the lease, GEB's outside auditor asked for additional information about the million dollar payment. In March 1990, the Board authorized appellant Chen to provide a more thorough description of the three reasons. Chen wrote a letter dated March 9, 1990, expanding upon those reasons. He specified that the leasehold improvements included items designed and built exclusively for GEB's use, such as a solid wall separating GEB's area from the remainder of the building, an elevator, and two staircases. He also explained that "a meter room, boiler room and telephone room [had] been relocated to the other part of the building in order to give more usable space to the Bank." With respect to the thirty-year lease, Chen wrote that GEB's ability to negotiate the longer lease was of great value to it and that the payment was partial compensation to the owner for the "decrease in the value of the real estate as investment." Finally, Chen noted that the right of first refusal was "an asset to the tenant."

In 1997, the Federal Reserve Bank of New York ("FRBNY") sought information from GEB concerning the million dollar payment. GEB's banking attorney, relying on information provided by Chen and Liu, among others, told FRBNY that GEB and Seven Giants had an unwritten understanding that the million dollar payment would be credited to GEB in the event GEB ever purchased the property from Seven Giants. In accordance with this position, GEB and Seven Giants entered into a agreement "amending and supplementing" the original lease agreement ("Supplemental Agreement"). The Supplemental Agreement indicated that "[Seven Giants'] intention is, and has always been, to provide to [GEB] an option to purchase the Premises within a reasonable period after commencement of the Lease on terms which provide to the Tenant the benefit of" the million dollar payment.

The government charged four members of the Board, including Chen, Liu, and Tu, with conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371, misapplication of bank funds in violation of 18 U.S.C. § 656, and making false entries in bank records in violation of 18 U.S.C. § 1005. Furthermore, in connection with the making of the Supplemental Agreement, the government charged the defendants Chen and Liu with additional counts of conspiracy to make false entries in bank records, in violation of 18 U.S.C. § 371, and making false entries in the books and records of a bank, in violation of 18 U.S.C. § 1005.

Prior to the indictments in this case, defendant Tu attempted to cooperate with the government. He attended four sessions with interviewers from the Federal Bureau of Investigation ("FBI") and FRBNY. The interviews were conducted partly in English and partly in Mandarin Chinese, with FBI Special Agent Herman NG serving as translator. Tu's efforts to become a cooperator ultimately proved unsuccessful.

At trial, David Bradley, whose firm had created the Bradley Appraisal purportedly relied upon by the Board, explained why the lease, particularly when viewed in conjunction with the million dollar payment, resulted in payments to Seven Giants that were substantially above market value. Bradley testified that although an upfront payment was not per se improper, ordinarily a tenant who makes such a payment would expect to receive a corresponding decrease in rental payments. Bradley testified that, in this case, the tenant should have paid "substantially less" rent for the first five years. The government's proof showed that instead, GEB was to pay $373,550 (a figure not discounted to reflect the time value of money) in rent and taxes above what the Bradley Appraisal had recommended.

As for the three specific reasons memorialized in the rental agreement, the government presented extensive evidence at trial showing that the three benefits identified were worth much less than one million dollars. With respect to the "leasehold improvements," the government elicited testimony from Bradley indicating that the Bradley Appraisal reflected the value of the elevator and the staircases, and that consequently, the calculation of the rent was higher than it otherwise would have been. Accounting for these items in the million dollar payment and in higher rents meant double payment for GEB. The architect of the headquarters testified that the relocation of the meter, boiler, and telephone room had never occurred; nor had Seven Giants been billed for any such relocation.

The government questioned both Bradley and its own expert witness D. Kenneth Patton about the effect the longer lease had on the value of the property. Bradley explained that if a lease calls for above-market increases in rent, it is an asset to the landlord. Patton explained the benefits a landlord receives from the guaranteed increases in the rental stream and opined that a tenant would ordinarily not have to pay a landlord upfront to get a longer-term lease.

Patton also testified that the right of first refusal was of little or no value to GEB. Any outside party buying the property would be willing to pay an above-market price because of the above-market rental payments being made by GEB. To exercise the right of first refusal, GEB would have to match that above-market price. Thus, the right was of negligible value at most.

The government also relies on the later creation of the Supplemental Agreement to further undercut the bona fides of the defendants' original three reasons. It should be noted that the jury acquitted Chen and Liu of the charges related to the Supplemental Agreement. Nonetheless, the

government convincingly argues that the post hoc creation of a document presenting an entirely new fourth justification for the million dollar payment evidenced the defendants' awareness of the insufficiency of the original three justifications.

The jury returned a guilty verdict with respect to all defendants on the first three counts. This appeal followed. Chen and Liu challenge the jury instructions on the intent necessary to support a conviction for misapplication of bank funds. They claim that the introduction of Tu's statements through the testimony of Agent Ng violated Bruton v. United States, 391 U.S. 123 (1968). They also challenge the sufficiency of the evidence. Tu filed a separate brief arguing that the court failed to instruct the jury in accordance with his theory of the defense.

DISCUSSION

I. The Misapplication of Bank Funds Charge

Chen and Liu contend that the jury instructions on misapplication of banks funds were flawed in two ways. First, they argue that the district court's references to civil fiduciary duties allowed the jury to convict them based on a finding that they had breached those civil duties. Second, they challenge the district court's refusal to direct the jury to find that defendants acted with knowledge that their conduct was unlawful.

The misapplication of bank funds statue ("Section 656") prohibits bank officers and directors from "embezzl[ing], abstract[ing], purloin[ing] or willfully misapply[ing]" bank funds. 18 U.S.C. § 656. The pre-1948 version of the statute included a requirement of intent "to injure or defraud the bank or to deceive a bank officer or agent appointed to examine the affairs of the bank." United

States v. Docherty, 468 F.2d 989, 994 (2d Cir. 1972), abrogated on other grounds as recognized in United States v. McElroy, 910 F.2d 1016, 1025 (2d Cir. 1990) (internal quotation marks omitted). We have consistently held that despite the omission of this language from subsequent versions of the statute, this intent requirement remains an element of the offense. Docherty, 468 F.2d at 994; see also McElroy, 910 F.2d at 1024.

The challenged jury instruction on Section 656 intent read:

> To act with the intent to [defraud] is to act knowingly and deliberately for the purpose of taking a financial advantage of a fiduciary relationship.
>
> A bank officer or director is a fiduciary of the bank. As such, he owes loyalty and allegiance to the bank. A loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the bank.
>
> He may not profit at the expense of the bank and in conflict with its rights. While related-party transactions are not prohibited, a director acts with the intent to defraud the bank if he knowingly and deliberately uses his position to obtain money belonging to the bank for himself or others, for which the bank does not receive a comparable benefit or value in return.
>
> In the present case, in order to determine whether the defendants

deliberately took advantage of the fiduciary relationship with the Great Eastern Bank to obtain money of the bank for the benefit of Seven Giants and for themselves, it is not enough to conclude that the bank overpaid Seven Giants or that it made a bad business decision.

In the course of our life's experience, we sometimes obtain a bargain because someone unknowingly failed to judge the value of the goods or property he sold us and sometimes we ourselves overpay because we mistakenly overvalue the goods or property we purchase.

What is necessary here to find the requisite element of the intent to defraud is (1) that a defendant deliberately used his position as a director of the Great Eastern Bank to cause the bank to pay one million dollars as part of the lease transaction to Seven Giants and (2) [ ] that the defendant knew that the one-million dollars paid was substantially more then the value of what a person, totally unrelated to Seven Giants, would have paid for what Great Eastern Bank received in return from Seven Giants.

...

If, at the time the lease was signed, a defendant entertained a good faith belief that the value of what Great Eastern Bank received in return from

> Seven Giants was not substantially less than the one-million dollars it paid, then he did not act with the intent to defraud the Great Eastern Bank when he voted to approve the one-million dollar payment to Seven Giants and received a portion of that payment.

We find that this instruction adequately conveyed to the jury that it was required to find that the defendants specifically intended to injure GEB and, hence satisfied the scienter requirement of Section 656.

Contrary to defendants' arguments, Section 656's intent requirement is properly read in the disjunctive and thus proof of intent to injure or defraud is sufficient to support a conviction. See Valansi v. Ashcroft, 278 F.3d 203, 210 (3d Cir. 2002) ("Because the [scienter] element is stated in the disjunctive, it may be shown either by intent to inure or intent to defraud.") United States v. Angelos, 763 F.2d 859, 861 (7th Cir. 1985) ("[I]t is important to distinguish between intent to injure and intent to defraud; either will do, and they are not the same."). As we explain below, because we conclude that the instruction given required the jury to find that the defendants intended to injure GEB, we need not also consider whether the instruction adequately instructed the jury to find that defendants intended to defraud the bank.

Most of this Circuit's misapplication of bank funds cases have involved different factual circumstances than those in the case at hand. Typically we have addressed situations where bank officers made loans that were fraudulent or that violated bank regulations in some way. See McElroy, 910 F.2d at 1019-20; United States v. Castiglia, 894 F.2d 533, 534-35 (2d Cir. 1990); United States v. Clark, 765 F.2d 297, 299-301 (2d Cir. 1985); United States v. Cleary, 565 F.2d 43, 45-46 (2d Cir. 1977);

Docherty, 468 F.2d at 990-92; United States v. Iannelli, 461 F.2d 483, 484 (2d Cir. 1972); United States v. Fortunato, 402 F.2d 79, 80 (2d Cir. 1968). In all of these cases, we have focused much of our attention on the mens rea necessary when these fraudulent or otherwise incorrect loans have been made. With improper loans, particularly loans made to third parties with no direct benefit to the defendant, the necessary intent may be hard to prove. Indeed, we have twice overturned convictions because of problems with the intent element. In Cleary, we held that the trial court should have allowed the jury to hear evidence of repayment. 565 F.2d at 47. We also held that the court should have instructed the jury to consider whether the named debtor had the ability to repay and whether he actually did repay the loan in determining whether the defendant had the requisite intent to expose the bank to loss. Id. At 47-48. The primary issue in Docherty was also whether there was sufficient evidence on the intent element. 468 F.2d at 995. The Court found that the evidence of defendant's intent to injure the bank was insufficient, because the defendant, who was taking out the loans in his own name and passing the money to his bank officer friend, knew that he was liable for repaying the loans and because there was no suggestion that defendant did not have the means to repay the loans. Id.

Our task in evaluating the jury instructions and evidence in this case is not nearly so problematic. The theory of the misapplication of funds here involved a much simpler type of transaction, and the intent is therefore somewhat easier to discern. The theory of the case is that the defendants misapplied bank funds by arranging for GEB to make the one million dollar payment to Seven Giants, although they knew that GEB was not obtaining substantially equivalent value in return. If the bank is not receiving fair value, the harm to the bank is certain at the time of payment. The jury was instructed to determine intent by discerning whether defendants knew that the payment was substantially

unfair to GEB and nonetheless acted deliberately in approving the payment from GEB to Seven Giants. While this instruction claimed to be describing the element of "intent to defraud," it actually set forth the test for intent to injure. However, this minor mis-description amounts to no more than harmless error because the jury, using the court's instruction, still found the requisite intent, albeit under the wrong name. See United States v. Masotto, 73 F.3d 1233, 1239 (2d Cir. 1996) ("An error is deemed harmless if we are convinced that the error did not influence the jury's verdict.").

The district court did not err in adapting its instructions to the particular circumstances of this case. In fact, we have held that a "district court must tailor its instructions to the facts of the case before it." United States v. Regan, 937 F.2d 823, 828 (2d Cir. 1991). Nor did the court err when, faced with the largely inapposite case law and instructions from this Circuit, it looked to our sister circuit for some guidance. Rather, the instruction ultimately developed by the district court fully accords with the law of this Circuit. The court clearly told the jury that it could only convict if it found "(1) that a defendant deliberately used his position as a director of the Great Eastern Bank to cause the bank to pay one million dollars as part of the lease transaction to Seven Giants and (2) [ ] that the defendant knew that the one-million dollars paid was substantially more than the value of what a person, totally unrelated to Seven Giants, would have paid for what Great Eastern Bank received in return from Seven Giants." A guilty verdict necessarily included a finding that defendants acted deliberately although they knew that GEB would suffer some financial harm by entering into a transaction in which it did not receive fair value. This clearly satisfies the Section 656 intent requirement.

We do not suggest that a version of these instructions would be appropriate in every misapplication of bank funds case. For example, we doubt whether in the improper loan context, it would be sufficient to instruct the jury to convict if "(1) the defendant deliberately used his position as director to make a loan (2) that he knew was risky and was likely to put the bank in financial difficulty," although, like the instructions in the case at hand, this formulation contains a reference to deliberate action combined with knowledge of harm to the bank. We emphasize that "a charge that is adequate and proper in one case may not play the same role in another case involving a different set of facts." Regan, 937 F.2d at 828. As we noted in Docherty, 468 F.2d at 995, "[a] statement in an opinion must be read in the light of the facts and contentions to which it is addressed."

Chen and Liu's specific challenges to the instructions are without merit. As indicated by our discussion above, the instructions of the district court clearly required the jury to find intent, a much higher standard of scienter than the simple negligence required in a breach of civil fiduciary duties. The references to civil fiduciary duty, while less than ideal, did not alter the fact that the jury specifically had to find deliberate action in the face of knowledge of harm to GEB. The defendants' contention that the jury should have been instructed that the defendants must know that their conduct is unlawful is equally unpersuasive, considering that the district court found that the defendants' approval of the lease was "deliberate." After all, "in many contexts, [] 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful." Cheek v. United States, 498 U.S. 192, 209 (1991) (Scalia, J., concurring) (citing Am. Sur. Co. of New York v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925).

II. The Alleged Bruton Violation

Chen and Liu contend that the court's admission of certain statements of codefendant Tu violated their Sixth Amendment rights under Bruton v. United States, 391 U.S. 123 (1968). These statements were admitted through the testimony of Agent Ng, who was present during the interviews with Tu when he was attempting to become a cooperating witness.

In Bruton, the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the introduction of the confession of a non-testifying codefendant that implicates the defendant in a crime. Id. at 126. A court cannot cure the introduction of such a statement through a limiting instruction. Id. at 137. In Richardson v. Marsh, 481 U.S. 200 (1987), the Court limited the reach of Bruton by holding that when a confession is redacted so that it does not facially incriminate the defendant, its admission with a proper limiting instruction does not violate the Confrontation Clause. Id. at 211. The Court did leave open the question of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Id. at 211 n.5. The Court answered the question left open in the Richardson footnote in Gray v. Maryland, 523 U.S. 185 (1998), holding that Bruton does apply to "statements that, despite redaction, obviously refer directly to someone, often obviously to [the defendant], and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." Id. at 196.

Chen and Liu contend that the statements of Tu attributed criminal intent to the entire GEB Board. They note that the jury heard testimony that Liu and Chen were key players on the GEB Management Team who advocated for the lease transaction and for the three reasons

memorialized in the Board's minutes. Chen and Liu's attempts to bring Tu's statements under the Bruton rule fail. Although some of Tu's statements may implicate the Board as a whole, they only do so with the assistance of other testimony. The most relevant portions of Ng's testimony are excerpted below:

Q. During the interview, did you ask the defendant certain questions about the $1 million payment from the bank to Seven Giants?
A. Yes, I did.
Q. When you asked questions about the million-dollar payment, what term did the defendant use in English to refer to the $1 million payment?
A. Mr. Tu told me that the transaction was in English, "inside transaction."
Q. Did you ask Mr. Tu, in substance, what his view of this inside transaction was?
A. When I asked him about that transaction, Mr. Tu told me that that was not right And it was the wrong thing to do.
Q. Do you recall the word or words he used to just express what you just said? Not right or wrong?
A. Mr. Tu used the term in Chinese bu dui
...
Q. And what does that word mean?
A. The word bu dui means not right and wrong.
Q. Did you ask Mr. Tu why, in his mind, it was not right or wrong to pay the million dollars?
A. Yes, I did.
Q. And what, in substance, did Mr. Tu say?
A. Mr. Tu told me that as a bank officer, his duties are to look out for the benefits of

the bank and the depositors. To transfer the money to themselves, the Board of Directors, it was a wrong thing to do.

Q. According to Mr. Tu, at what point in time did he think this million-dollar payment was not right; wrong?

A. Mr. Tu told me that during a certain Board meeting when the discussion of transferring the million dollars to the directors, at that Board meeting, they found that it was the wrong thing to do as the Board of Directors. It was against the duties as the Directors of a bank.

...

Q. Did you question Mr. Tu about the three reasons given by the bank for the $1 million payment, reasons given at the time of payment?

A. Yes, I did.

Q. Do you recall when you asked him about those three reasons, what word or words he used to express his view of those three reasons?

A. When I asked Mr. Tu about those three reasons, Mr. Tu told me that those reasons were – he used the word bu dui, meaning not right and wrong.

...

Q. Do you recall what, if anything Mr. Tu said about leasehold improvements, one of the three reasons?

A. Yes, I did. Mr. Tu told me that the reasons are not right because the first reason as stated in here was leasehold improvement. There's no leasehold improvement involved. All the construction inside the bank were done and paid for by the bank

to contractors. So, there might be some minor things but those minor improvements did not come anywhere close to a million dollars.

...

Q. Do you recall what, if anything Mr. Tu said about the remaining two reasons; the thirty-year lease and the right of first refusal?

A. Mr. Tu also told me that those two reasons are wrong and not right reasons.

Q. And again, what word did he use again?

A. He again used the word bu dui.

Q. And the close of your questions about these three reasons, did you ask the defendant in substance why, in his understanding, these three reasons were included in the minutes if they were wrong?

A. Yes, I did.

Q. And what did Mr. Tu say?

A. When I asked Mr. Tu that if the reasons were wrong and not right answer for the transfer of the million dollars, then why is it recorded in the minutes? Mr. Tu told me that it's fake. It's falsely made up to cover the transaction.

We have added emphasis to the testimony subsequently struck by the district court upon the urging of Chen and Liu. The district court indicated that the stricken testimony was "prejudicial because of the considerations underlying the confrontation clause."

Chen and Liu argue that all of Tu's statements regarding the Board violated Bruton, as that case was applied and interpreted in Gray. Although the line between testimony that falls within Bruton's scope and that which does not is often difficult to discern, we are persuaded in the

instant case that the statements by Tu, including those which the district court agreed to strike, either do not implicate Chen and Liu at all or else fall squarely within the Richardson holding. Many of Tu's statements concern only his state of mind. The statements that inculpate other board members only do so when placed in context with other testimony outside of Tu's statements. Although, in certain instances, evidence that does not directly name a co-defendant can implicate Bruton, see Gray, 523 U.S. at 195 (observing that the use of "[i]nference pure and simple [to connect testimony to a co-defendant] cannot make the critical difference" regarding whether a statement implicates Bruton), this case falls safely outside of Bruton's scope because substantial evidence was necessary to link defendants Chen and Liu with Tu's statements regarding the Board. See id. at 196. Chen and Liu implicitly recognize this point in their brief, when they note that Tu's statements "powerfully implicate[] all members of the GEB Board...because the jury heard testimony and argument by the Government that Liu and Chen were key players on the GEB 'management team' that developed and advocated for the lease transaction and for the three reasons memorialized in the Board's minutes."

Chen and Liu also direct our attention to Crawford v. Washington, 124 S.CT. 1354 (2004), suggesting that it provides additional support for their position.** In Crawford the Supreme Court held that an out-of-court "testimonial" statement offered against an accused is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 124 S.Ct. at 1374. However, the Supreme Court refused to provide a comprehensive definition of the term "testimonial," explaining only that "it applies at a minimum to prior

---

** In response, we requested supplemental briefing on this issue, and have carefully considered the parties' arguments as presented therein.

testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogatories." Id. Nevertheless, we need not determine at this stage whether the results of a failed proffer session fall within this loose definition. For Crawford to provide assistance to Chen and Liu, Tu's statements must have been admitted against them. As discussed above, Tu's statements inculpate Chen and Liu only in the context of the substantial evidence used to link them to Tu's statements. The same attenuation of Tu's statements from Chen and Liu's guilt that prevents Bruton error also serves to prevent Crawford error. Thus, there is no separate Crawford problem, and we see no indication that Crawford overrules Richardson or expands the holding of Bruton. We therefore do not find that the admission of any of Tu's statements violated the Confrontation Clause.

III. Insufficiency of the Evidence

When considering a challenge to the sufficiency of the evidence after a jury has rendered a guilty verdict, we view the evidence in the light most favorable to the government, Jackson v. Virginia, 443 U.S. 307, 319 (1979), and construe every permissible inference in the government's favor, United States v. Martino, 759 F. 2d 998, 1002 (2d Cir. 1985). We affirm the conviction so long as "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original). Chen and Liu's challenge to the sufficiency of the evidence fails.

As we discussed above, the government presented convincing evidence that the three proffered justification could not account for the value received by the bank in making the million dollar payment. From this proof, the jury could easily infer that Chen and Liu, as experienced professionals, were fully aware of the lopsided nature of the transaction and nonetheless elected to push the transaction

through the Board for the benefit of the interested directors, including themselves. Beyond the very strong circumstantial case, the government also elicited testimony from directors Paul Lee and Guang Tsan Wang suggesting that Chen and Liu had the necessary intent to harm the bank. For example, Lee testified that the three reasons were not real reasons, and Wang testified that, after his original vote to abstain, he was told by a member of the Management Team that it would not look good for an outside director to abstain. Although Lee and Wang may not have provided testimony that was exclusively in support of the government, given the standard by which we analyze sufficiency of the evidence challenges, it is clear that the jury could have used portions of their testimony in find the element of intent.

To the extent that Tu joined Chen and Liu's challenge to the sufficiency of the evidence, we also find that the evidence was sufficient with respect to his conviction. Of course, given Tu's less powerful status on the Board, not all the evidence implicating Chen and Liu also implicated him. However, with respect to Tu, the jury was also able to consider the testimony of Agent Ng about Tu's statements, which the jury could interpret as admissions of his culpable intent.

IV. Tu's Requested Jury Instructions

In a separate brief, Tu argues that the district court erroneously refused to give two jury instructions that were central to his theory of the defense. Tu's trial strategy was to show that he did not intend to misapply bank funds, but rather acted in good faith reliance upon the recommendation of the Management Team. Tu had sought an instruction regarding New York State Banking Law § 7015, which states that in discharging his duties, a director of a bank may rely in good faith upon a report prepared in the ordinary course of business by an officer or committee charged with

responsibility for such report. Tu had also requested a good faith reliance charge that did not marshal evidence in favor of the government. "We will vacate a conviction on account of a missing requested instruction if (1) the requested instruction was legally correct; (2) it represents a theory of defense with basis in the record that would lead to acquittal; and (3) the theory is not effectively presented elsewhere in the charge." United States v. Prawl, 168 F. 3d 622, 626 (2d Cir. 1999) (internal quotation marks omitted).

Tu requested a charge that read:

> Defendant Schuman Tu contends that he acted in good faith in connection with the lease transaction at issue because he relied, in part, on statements made by members of the Management Team of the Bank....I instruct you that a Bank Director, when acting in good faith, may rely upon reports prepared in the ordinary course of business by an officer or committee charged with the responsibility of preparing such a report. N.Y.S. Banking Law Section 7015.
>
> Accordingly, you may consider any such good-faith reliance by Schuman Tu in determining whether he acted in good-faith in connection with the lease transaction, the million dollar payment or the reasons given by [GEB] for that lease transaction and payment.

The court initially declined to instruct the jury on Section 7015 as Tu requested, because it found that "as a matter of law, [the statute is] not applicable here." The court explained that Tu could not "entertain a good faith belief in what other directors tell [him] with respect to representations

they make in a transaction [in] which you know they have a personal interest."

The Court had proposed a good faith reliance charge that read:

> There is evidence of statements made by members of the Management Team of the bank concerning the reasonableness of the 30 year lease, the reasonableness of the million dollar payment and the accuracy of the reasons given by GEB for that payment in the lease transaction as well as its legality.
>
> Defendant Schuman Tu argues that this evidence establishes that he relied on the accuracy of these representations and entertained a good faith belief that the value of what GEB received in return from Seven Giants was not substantially less than the $1 million it paid.
>
> A good faith belief is not a blind faith belief. It means that a reasonable person in the defendant's position would have relied on these representations. In determining whether defendant Schuman Tu relied in good faith on these representations you should consider who made the statements, whether they had a personal interest in securing the $1 million payment for Seven Giants, and whether, if there was such a personal interest on the part of the person or persons making the representations, defendant Schuman Tu was aware of it.
>
> If defendant Schuman Tu entertained a good faith belief that the value of what GEB received in return from Seven Giants was not

> substantially less than the $1 million it paid, then he did not act with the intent to defraud GEB when he voted to approve the $1 million payment to Seven Giants and received a portion of that payment.

After Tu's counsel criticized the reference to an objective "reasonable person" standard, the court agreed to take out the sentence including that reference. Tu's counsel then challenged the instruction because of the way that it "marshal[ed] the negative elements." He argued that if the court included the negative evidence he should be able to "marshal[] the other side of the story, which is that these were people who ran the bank, the[y] regularly had committees, Schuman Tu was not in power at that time, he had no reason to think they were breaching their duty in this transaction, because they all had been loyal to the bank in the past." However, noting that this would create a "whole laundry list," Tu's counsel suggested that an even more appropriate course would be to instruct the jury to consider "the totality of the circumstances" and to allow both prosecution and defense to argue the facts. He therefore requested that the court instruct the jury with a "plain vanilla" reliance charge. This new charge proposed by Tu read:

> There is evidence of statements made by members of the Management Team office bank concerning the reasonableness of the 30 year lease, the reasonableness of the million dollar payment and the accuracy of the reasons given by GEB for that payment in the lease transaction as well as its legality. Defendant Schuman Tu argues that he relied on the accuracy of these representations in connection with the Board's decision to go forward with the lease transaction. You may consider any such good-faith reliance, if

> established by the evidence, in determining Schuman Tu's state of mind at the relevant time period.

When the court declined to give the "plain vanilla" charge, Tu's counsel asked that it remove the good faith reliance charge altogether.

The relevant part of the state banking law reads:

> Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In discharging their duties, directors and officers, when acting in good faith, may rely upon...reports...prepared in the ordinary course of business by an officer or committee charged with the responsibility therefore.

N.Y. Banking Law § 7015(1). Tu's contention that the district court summarily rejected a Section 7015 charge is contradicted by the record. It is true that the court originally emphasized that the statute was inapplicable as a matter of law. However, after the court had reiterated that the "statute is not applicable here," Tu's counsel interjected, "[b]ut, for criminal purposes, your Honor..." At that point, the court appears to have been persuaded that there might be a limited use for the statute: "For criminal purposes, you could try and persuade the jury you relied on it. But, you know, I think it's important to call attention to the facts which go to the ultimate question of good faith reliance." This indicates that the district court was open to instructing the jury on the statute, if the instruction referenced the personal interest of those preparing the reports. However, Tu demonstrated that

he was opposed to any sort of good faith instruction that called attention to the fact that the Management Team had an interest in the transaction about which he was informed. We agree with the district court that Tu could only use the statue for the limited purpose of demonstrating that, because of his good faith reliance, he lacked the necessary intent to defraud.

Thus, with respect to both Tu's contentions, the important question is whether the court erred in insisting that the jury, in evaluating Tu's good faith defense, be instructed to "consider who made the statements, whether they had a personal interest in securing the $1 million payment for Seven Giants, and whether, if there was such a personal interest on the part of the person or persons making the representations, defendant Schuman Tu was aware of it." The district court did not err in insisting that it should instruct the jury that a "good faith belief is not a blind faith belief" and that the jury should consider whether the members of the committee upon whom Tu purportedly relied had a personal interest in the transaction of which Tu was aware. Indeed, the district court "has broad discretion to decide which facts, if any, it will mention in its comments to the jury." United States v. GAF Corp., 928 F.2d 1253, 1263 (2d Cir. 1991). This discretion is limited only by "the requirement that the charge be fair to both sides." Id. The language proposed by the court does not marshal evidence in favor of the prosecution; it merely gives balance and context to Tu's good faith reliance charge. The court properly insisted that the jury needed to understand that good faith reliance cannot be evaluated without taking into account the personal interests of those upon whom Tu allegedly relied and Tu's knowledge of those interests. Thus, the district court's charge was fair to both sides.

Moreover, in United States v. McElroy, 910 F.2d 1016 (2d Cir. 1990), we rejected defendant's contention that the district court's failure to give an instruction on a good

faith defense constituted reversible error. We found that the court's general instructions on intent to defraud the bank "conveyed the essence of a 'good faith defense' instruction." Id. at 1026. Here, in addition to the intent to defraud instruction that we have approved, the court also gave a good faith instruction:

> If, at the time the lease was signed, a defendant entertained a good faith belief that the value of what Great Eastern Bank received in return from Seven Giants was not substantially less than the one-million dollars it paid, then he did not act with the intent to defraud the Great Eastern Bank when he voted to approve the one-million dollar payment to Seven Giants and received a portion of that payment.

Following our precedent in McElroy, we conclude that this instruction was sufficient to convey the essence of Tu's requested good faith reliance instruction.

V. Sentencing Issues

At the close of trial, the jury was only asked to determine guilt and did not confirm the amount of funds that were mishandled. Therefore, it appears that Blakely v. Washington, 124 S.Ct. 2531 (2004), might have some relevance. While the defendants did not raise any sentencing issues on appeal and did not bring Blakely to the attention of the panel, we stay the issuance of the mandate in this case out of an abundance of caution. The mandate will be held pending the Supreme Court's expected decision in United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105 (to be argued October 4, 2004). Should any party believe there is a need for the district court to exercise jurisdiction prior to the Supreme Court's decision, it may file

a motion seeking issuance of the mandate in whole or in part. Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not consider the waiver or substance of any issue concerning defendant's sentence until after the Supreme Court's decision in Booker and Fanfan. In that regard, the parties will have until fourteen days following the Supreme Court's decision to file supplemental petitions for rehearing in light of Booker and Fanfan.

CONCLUSION

For the reasons discussed above, we affirm the convictions.

Appendix B – Order denying Petition for Panel Rehearing dated March 29, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie, Clerk

Date:	3/25/05
Docket Number:	02-1055-cr
Short Title:	USA v. CHEN
DC Docket Number:	99-cr-694
DC:	EDNY(Brooklyn)
DC Judge:	Honorable Edward Korman

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the city of New York, on the 29th day of March, two thousand five.

STAMP
United States Court of Appeals
Filed March 29, 2005
Roseann B. MacKechnie, Clerk
Second Circuit

Present
Hon. John M. Walker, Jr., Chief Judge
Hon. Rosemary S. Pooler,
Circuit Judges
Hon. John Gleeson,
District Judge, Eastern District of New York

USA v. Chen 02-1055

A petition for panel rehearing having been filed herein by Appellant Lung Fong Chen.
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk

_____/s/_____
Motion Staff Attorney

Appendix C
18 U.S.C. Section 371

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 19. CONSPIRACY

18 USCS § 371 (2005)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Appendix D
18 U.S. C. Section 656

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 31. EMBEZZLEMENT AND THEFT

18 USCS § 656 (2005)

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or holding company, branch, agency, or organization or any moneys, funds, assets or securities intrusted to the custody or care of such bank or holding company, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or

other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act [12 USCS § 1813].

Appendix E
18 U.S.C. Section 1005

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 47. FRAUD AND FALSE STATEMENTS

18 USCS § 1005 (2005)

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System; or

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this

section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—

Shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title [18 USCS § 20(9)]. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act [12 USCS § 1813(w)(1)].